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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In Matter of	)	
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Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
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To: The Commission	)	

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COMMENTS OF CO SPACE SERVICES, INC. TO THE SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

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SUMMARY OF COMMENTS

1. CO Space Services, Inc. will provide facilities that will house telecommunications, Internet, data processing, data storage and related equipment. To attract and properly service its customers, CO Space and its customers will need access to the incumbent LECs' dark fiber.

2. Incumbent LECs ordinarily are unwilling to provide access to their dark fiber unless required to do so. The Commission should require them to do so on a national basis pursuant to sections 251(c)(3) and 251(d)(2) for numerous reasons, including the following: (a) as many courts have correctly held, dark fiber is a network element; (b) incumbent LECs have begun to use fiber in the local loop, and therefore without access to such fiber alternative providers will be unable to provide the services they wish to provide to end-users; (c) the growth of advanced services and other high bandwidth services will be thwarted if access to dark fiber is denied; (d) there are no suitable alternatives to the use of the incumbent LEC's dark fiber because, among other things, other facilities-based providers (to the extent they exist) do not have the breadth of facilities and often face regulatory hurdles that they have not overcome; (e) the amount of litigation, delay and costs relating to access to dark fiber will be reduced if it is a national UNE; (f) holding that dark fiber is a national UNE will spur investment in entities that heavily rely on dark fiber use; and (g) other equitable factors weigh in favor of finding that dark fiber should be a UNE on a national basis.

3. The Commission should establish a presumption that a network element must be unbundled pursuant to section 251(d)(2)(a), and the incumbent LEC should have the burden of rebutting the presumption by clear and convincing evidence. Otherwise, the time and expense of

litigation may result in parties seeking access losing their customers or potential customers in the interim.

4. To avoid unnecessary and excessive litigation of the unbundling issue, the Commission should establish a bright line test that the incumbent LEC must establish is met before it can claim that section 251(d)(2)(B) supports denial of access.

5. In determining whether to unbundle a network element, the Commission should consider, in addition to the factors listed in section 251(d)(2), the impact on competition from a denial of access, and the harm -- or the lack thereof -- to the incumbent LEC if it is required to unbundle the network element.

6. If the incumbent LEC denies owning or controlling the rights to any dark fiber in a requested location, it should have to prove its claim. In addition, upon request from a party seeking access to dark fiber, the incumbent LEC should be obligated to provide the maps and documentation showing the location and availability of the incumbent LEC's fiber.

7. The Commission should require incumbent LECs to install new dark fiber at the expense of the party seeking installation when the following factors, properly weighed, support such a ruling: (a) the harm or inconvenience, if any, to the incumbent LEC in installing the fiber, (b) the need for the dark fiber by the party requesting it, (c) any available alternatives, and (d) the impact on competition if such fiber is not provided.

8. The rules adopted by the Commission should not be eliminated without a Commission determination that they are no longer necessary. In three years, the Commission should review the state of competition to determine whether the rules are still necessary.

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COMMENTS OF CO SPACE SERVICES, INC. TO THE SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

CO Space Services, Inc. ("CO Space") hereby files its comments to the Second Further Notice of Proposed Rulemaking (the "Second NPRM") in the above-captioned proceeding.

INTRODUCTION

By the end of this year, in various cities in the United States CO Space will have secure, state-of-the-art facilities that will house telecommunications, Internet, data processing, data storage and related equipment. Unlike the owners or lessees of most facilities where such equipment is located, CO Space will not compete with the entities that use its facilities. CO Space will be purely a carrier's carrier.

At CO Space's facilities, customers will have the option of choosing common floor space, private floor space or private offices, and in each case they will have unimpeded access to their own equipment. Customers also will have the option of either maintaining their own equipment or selecting from the technical support packages CO Space will offer. The facilities will be designed to provide a competitive and open platform with no service purchase requirements or minimums.

CO Space intends to provide its customers with access to all major networks through either direct interconnection with providers or a fiber ring accessing incumbent and competitive carrier facilities. For this reason, as explained in more detail below, CO Space will need access to the incumbent local exchange carriers' dark fiber.

DISCUSSION

I. Dark Fiber Is A Network Element That Should Be Unbundled On A Nationwide Basis

A. Dark Fiber is a Network Element

Dark fiber service includes the provision of fiber optic transmission capacity "where the electronics and other equipment necessary to power or 'light' the fiber are provided by the customer, not the local exchange carrier." In re Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Serv., Memorandum Opinion and Order, 8 F.C.C.R. 2589 (1993), remanded on other grounds, Southwestern Bell Tel. Co. v. FCC, 19 F.3d 1475 (D.C. Cir. 1994) ("Dark Fiber Serv. Proceeding"). As numerous courts have held, dark fiber is a network element under section 153(29) of the Telecommunications Act of 1996 (the "1996 Act"). See, e.g., MCI Telecomms. Corp. v. BellSouth Telecomms., Inc., No. 97-76, 1999 U.S. Dist. LEXIS 2775 (E.D. Ky. Mar. 11, 1999) **(Tab 1)**; MCIMetro Access Transmission Servs., Inc. v. GTE Northwest, Inc., No. C97-742WD, 1998 U.S. Dist. LEXIS 11335 (W.D. Wash. July 7, 1998) **(Tab 2)**; U.S. West Communications, Inc. v. AT&T Communications of the Pac. Northwest, Inc., 31 F. Supp. 2d 839 (D. Or. 1998); MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.,7 F. Supp. 2d 674 (E.D.N.C. 1998).

Section 153(29) provides that a network element includes, among other things, any facility or equipment used in the provision of telecommunications service. 47 U.S.C. § 153(29). The United States Supreme Court has recognized that the definition of "network element" under section 153(29) is broad. AT&T Corp. v. Iowa Utils. Bd., __ U.S. __, 119 S. Ct. 721, 731 (Jan. 25, 1999). This broad definition "clearly" encompasses dark fiber, MCI Telecomms. Corp., 7 F. Supp. 2d at 680, which fiber is a facility or equipment used in the provision of telecommunications service. Any claim that dark fiber is not a network element because it is not currently in use is belied not only by the broad definition of "network element" under section 153(29) and the cases cited above, but also by the following:

- The Commission has held that dark fiber service is "wire communication" under the predecessor to the 1996 Act. Dark Fiber Serv. Proceeding, 8 F.C.C.R. at 2593.

- Switches that are not currently in use are unquestionably network elements. U.S. West Communications, Inc., 31 F. Supp. 2d at 854.

- Dark fiber is not stored in a warehouse but is already in the ground ready for use once the appropriate electronics are installed. In some instances it is even wound around lit fiber in the same sheathing. Therefore, dark fiber is less like inventory and more like a network element. Id; MCI Telecomms. Corp., 1999 U.S. Dist. LEXIS 2775, at *23 **(Tab 1)**; MCI Telecomms. Corp., 7 F. Supp. 2d at 679.

- The local loop unquestionably is a network element, and in certain areas fiber has already begun replacing copper in the local loop. If dark fiber is not a network element and is therefore not available as a UNE, competition will be thwarted. Ordinarily, there are no alternative facilities to an incumbent LEC's local loop to reach most end-users.

- If dark fiber is not available as a UNE, as shown below, competition in the provision of advanced telecommunications services would be thwarted.

B. Dark Fiber Should Be Unbundled On A National Basis

1. The Commission should establish minimum national unbundling requirements

In the Second NPRM, the Commission tentatively concluded that (a) the United States Supreme Court's decision does not prevent the Commission from establishing minimum national unbundling requirements, and (b) the Commission should establish such requirements. In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Second Further Notice of Proposed Rulemaking, FCC 99-70, CC Docket No. 96-98 ("Second NPRM"), at ¶¶ 13 & 14. The Commission is correct on both points. The Supreme Court decision neither expressly nor implicitly prevents the Commission from identifying network elements that should be unbundled on a national basis. As the Commission correctly recognized in the Local Competition First Report and Order, such unbundling will, among other things, allow smaller entities to take advantage of economies of scale, provide financial markets with greater certainty in assessing requesting carriers' business plans and reduce the likelihood of litigation regarding the requirements of section 251(c)(3). The latter benefit of reducing the likelihood of litigation becomes even more important now given the Supreme Court's decision to vacate the Commission's rulings with respect to the interpretation of the necessary and impair standards of section 251(d)(2). As discussed in Section III of these comments, that decision almost certainly will increase the amount of litigation of UNE issues. Such increase in litigation should not be further compounded by a reversal of the Commission's initial decision in the Local

Competition First Report and Order, and tentative conclusion in the Second NPRM, to establish a national minimum list of network elements.

2. Dark Fiber should be included on the national list

The national list of UNEs should include dark fiber because, as discussed in more detail below, (a) incumbent LECs have begun to use fiber in the local loop; (b) the growth of advanced services and other high bandwidth services will be thwarted if access to dark fiber is denied; (c) there are no suitable alternatives to the use of the incumbent LEC's dark fiber; (d) the amount of litigation concerning access to dark fiber will be reduced; (e) the financial markets will be more receptive to investing in entities such as CO Space that heavily rely on dark fiber use; and (f) other equitable factors weigh in favor of finding that dark fiber should be a UNE on a national basis.

(a) *Incumbent LECs have begun to use fiber in the local loop*

In the Second NPRM the Commission stated that "[i]t is our strong expectation that . . . loops will be generally subject to the section 251(c)(3) unbundling obligations." Second NPRM, at ¶ 32. The Commission noted that in the initial Local Competition proceeding even incumbent LECs agreed that the local loop is a network element that must be unbundled. Id. This is hardly surprising. It is well known that alternative facilities-based providers do not have anywhere near the breadth of the incumbent LECs' networks. Alternative facilities based providers usually do not even have access to most commercial buildings in a city, let alone residential properties.

What is critical for the purposes of these comments is that (i) some of the local loop is becoming fiber, and (ii) as time passes, more and more of the local loop will become fiber, given the need for advanced and higher bandwidth services as well as the other advantages that fiber offers over copper.[1/] In fact, in some new construction buildings, Bell Atlantic is only installing fiber.

Logically, the dark fiber portion of the fiber in the local loop must be subject to the same unbundling requirements as the copper portion of the local loop. Otherwise, incumbent LECs could avoid unbundling requirements and thwart competition by denying access to the fiber portions of the local loop. It is axiomatic that if alternative providers cannot reach the end-users, they cannot compete. The extent to which alternative providers have competed up to now is largely due to their access to the local loop. To prevent this access in the future through allowing incumbent LECs to withhold access to dark fiber would be a giant step backwards, not only for alternative providers but for end-users as well.

The solution is to allow unbundling of dark fiber on a national basis. The other theoretical solution — to use fiber from alternative providers — ignores the reality of telecommunications networks as they exist in 1999. Alternative providers have not duplicated the incumbent LECs entire infrastructure nor would such a plan ordinarily make economic sense. Moreover, CO Space and other entities that require access to dark fiber need it now; they cannot wait years hoping that others will duplicate the incumbent LECs' infrastructure. In short, there simply is no alternative for the last mile for high capacity services over fiber.

[1/] Fiber is already the primary medium used for the transfer of traffic along the backbone between nodes.

(b) *The growth of advanced services and other high bandwidth services will be thwarted if access to dark fiber is denied*

One of the "fundamental goals" of the 1996 Act was "to promote innovation and investment by all participants in the telecommunications marketplace, in order to stimulate competition for all services, including advanced services." In re Deployment of Wireline Services Offering Advanced Telecommunications Capability, First Report and Order and Further Notice of Proposed Rulemaking, FCC 99-48, CC Docket No. 98-147, at ¶ 1 (1999) ("Advanced Telecommunications Capability") (emphasis added). Under Section 706 of the 1996 Act, the Commission is required on a regular basis to issue a notice of inquiry concerning the availability of advanced telecommunications to all Americans and to determine whether such telecommunications is being deployed in a reasonable and timely fashion.[2/]

As the Commission has recognized, the market for advanced telecommunications is a nascent one which, while ripe for competition, could be stymied if the barriers to competition are not removed. Advanced Telecommunications Capability, at ¶¶ 2 & 3. One of the potential barriers to competition in the advanced services market is denial of access to critical facilities and equipment. The Commission began to address that barrier in its rulings in the Advanced Telecommunications Capability proceeding wherein the Commission adopted new collocation requirements. The Commission needs to further reduce this barrier in the instant rulemaking, which the Commission can do by holding that dark fiber is a network element

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[2/] "Advanced services" or "advanced telecommunications capability" ordinarily refers to high-speed, switched, broadband telecommunications capability that enables users to originate and receive high quality voice, data, graphics and video telecommunications using any technology. 47 U.S.C. § 157 note; Advanced Telecommunications Capability, at ¶ 1 n.2.

nationally. If the Commission fails to so find, fiber that is often necessary to provide advanced telecommunications services and other services that require high bandwidth will be inaccessible to competitive providers. Competitive telecommunications carriers, including CO Space's customers, must obtain high-speed interconnection of networks, which they can often only obtain via fiber.

The situation will get worse, not better, over time if access to dark fiber is denied. Many of CO Space's customers, including entities in the data storage and enterprise communications industries, currently need transport at optical levels of OC-48 or above, or require non-SONET transport. End-users, and therefore telecommunications providers, continually need greater bandwidth than before, which increases the need for access to dark fiber. Moreover, given that the incumbent LECs will have access to their own fiber, it is imperative that CO Space's customers and other alternative providers also have access to dark fiber. Otherwise, they will not be able to provide services on par with the incumbent LECs. In short, without access to dark fiber, the advanced services market will remain nascent and the competition that Congress and the Commission wants to occur will not materialize.

Finally, CO Space itself also would be harmed by an inability to access dark fiber. CO Space's customers need to have high bandwidth access to fiber networks to the collocation facilities of virtually every carrier in the cities that CO Space serves. CO Space's customers, of course, also need access to the end-users. Without access to dark fiber, however, these customers often will lack the access they need. That, in turn, will discourage potential customers from using CO Space's facilities.

(c) *There are no suitable alternatives to the use of the incumbent LEC's dark fiber*

Not only are there a lack of alternatives to the incumbent LEC's dark fiber for the last mile, there often are no suitable alternatives from the central office to the last mile. In some towns and cities there is no dark fiber other than that owned by the incumbent LEC. In other locations, such as Boston, providers want to construct dark fiber but are facing significant delays caused by requirements that the municipalities are seeking to impose. Even where another provider has dark fiber from the central office up to but not including the last mile, it is not required to lease it, and owners of dark fiber often seek to charge exorbitant rates for its use, which prevents companies from leasing such fiber. In addition, in some instances there may not be sufficient capacity for all of the providers who want to use the alternative provider's fiber.

Microwave or other wireless transmission also is not the answer. For most of CO Space's customers and many other providers, the bandwidth requirements eliminate microwave as a possibility.

Purchasing transport from the incumbent LEC also does not resolve the problem. For CO Space, many of its customers, including those in the data storage and enterprise communications industries, do not use the SONET protocol, which is the protocol used by the incumbent LECs for voice and data traffic. These CO Space customers use the Fiber Channel protocol, and their industries have made substantial investments in such protocol. Therefore, they cannot use transport from the incumbent LECs but rather must have access to dark fiber.

Moreover, even where there is no protocol problem, transport can include extra elements or services not needed, thereby unnecessarily increasing the costs. If transport always resolved the issue, there would have been no need for sections 251(c)(3) and 251(d)(2).

(d) *The amount of litigation concerning access to dark fiber will be reduced*

Many new and relatively small companies, such as CO Space, do not have the time or resources to litigate on a state by state basis whether dark fiber is a network element. If forced to take this approach, they risk obtaining a purely pyrrhic victory — one in which they hold the correct position but by the time they prevailed, they lost their customers and incurred enormous legal expenses to boot. Large companies often use litigation as a tool to prevent small companies from becoming fully viable competitors. The Commission should not allow that here, and it should find that dark fiber is a network element nationally.

(e) *The financial markets will be more receptive to investing in entities such as CO Space that heavily rely on dark fiber use*

While significant investment does not guarantee that a new telecommunications company will succeed and thereby add to the competition in the marketplace, the lack of such investment often guarantees failure. CO Space and other relatively new companies that rely on access to dark fiber likely will have far greater success with the financial markets if dark fiber is a network element nationally than if the issue must be resolved on a state by state basis. The financial markets prefer certainty to unpredictability, and for CO Space and others in similar circumstances, the markets would view positively a decision that dark fiber is an unbundled network element nationally.

(f) *Other equitable factors weigh in favor of finding that dark fiber should be a UNE on a national basis*

In addition to the foregoing, at least two other equitable factors support CO Space's position here. First, if the Commission does not find that dark fiber is a UNE nationally, many of the incumbent LECs will continue to refrain from providing dark fiber. This will result in a waste of resources. In that event, end-users and alternative providers will be harmed, as the former will not receive, and the latter will not be able to provide, advanced and other services while the incumbent LEC's dark fiber lies dormant under the ground.

Second, unlike certain other parts of the incumbent LECs network, dark fiber ordinarily is not proprietary. Therefore, incumbent LECs cannot raise any proprietary issues in seeking to avoid the unbundling of dark fiber. Moreover, a network element is more likely to be subject to unbundling where it is not proprietary since the factor in section 251(d)(2)(A) becomes irrelevant for such element.

Accordingly, for all the reasons set forth above, the Commission should hold that dark fiber is a UNE nationally.

II. A Presumption Should Exist That A Network Element Must Be Unbundled Pursuant to Section 251(d)(2)(A), And The Incumbent LEC Should Have The Burden Of Rebutting Such Presumption By Clear And Convincing Evidence

The objective of the 1996 Act to advance and promote competition should compel the Commission to find that (a) a presumption exists that a network element must be unbundled pursuant to section 251(d)(2)(a); and (b) the incumbent LEC has the burden of rebutting such presumption by clear and convincing evidence. Time, and almost always resources, are on the incumbent LEC's side. The more time the incumbent LEC can delay unbundling the network

element, the longer it can stave off competition. Often, the more legal fees and resources the incumbent LEC can force its competitor to expend in seeking to obtain the network element, the weaker its competitor will become.

For both of these reasons, it is incumbent upon the Commission to give a presumption in favor of the party seeking to access the network element, and to force the incumbent LEC to rebut that presumption by clear and convincing evidence. Otherwise, the parties will almost always become involved in a long, costly process that — no matter who ultimately wins — benefits the incumbent LEC. If the incumbent LEC must meet its burden by clear and convincing evidence, many proceedings will move much quicker and be less expensive to conduct. Such a standard is appropriate here given the difference in the harms to the parties from an unfavorable result. The incumbent LEC ordinarily will not be harmed at all even if it loses because it is reimbursed for the UNE. Conversely, if the party seeking access is denied such right, it often will suffer tremendous injury, which is why Congress gave parties the right to obtain such unbundled access in the first place.

CO Space's position that the presumption should favor the party seeking access is also supported by the incumbent LEC's superior knowledge as to much of the information relevant to the Commission's determination under section 251(d)(2). Incumbent LECs certainly are in a far better position to know whether their network elements are proprietary. They also will ordinarily have more knowledge about their own and their competitor's operations than a party entering the market seeking UNEs, and therefore the incumbent LEC often will be in a better position to know whether failure to provide the UNE will impair the ability of the carrier to provide the services it seeks to provide.

III. The Commission Should Establish A Bright Line Test For Interpreting Section 251(d)(2)(B), Which Will End The Inquiry As To That Factor If The Incumbent Local Exchange Carrier Cannot Establish That The Test Is Met[3/]

The Supreme Court's decision to vacate the Commission's decision interpreting section 251(d)(2)(B) will almost certainly lead to more litigation over whether that factor supports unbundling a network element. In light of the Supreme Court's holding, the facilities of competitors of the ILEC may be relevant in determining which party the section 251(d)(2)(B) factor supports, and a provider seeking access cannot simply show that its costs would increase if it does not receive the unbundled network element. These determinations will increase the likelihood and cost of litigation because they add further uncertainty and bring the operations of third parties further into the mix.

As discussed previously, if litigation becomes too costly and lengthy, any victory by the party seeking access may be a purely pyrrhic one. To avoid that from occurring the Commission should establish a bright line test, which if met would assure the party seeking access that the section 251(d)(2)(B) factor favors that party. That test should be tied to the difference in cost between obtaining the network element from the lowest cost competitor and obtaining it from the incumbent LEC. The Commission should hold that the failure to provide access necessarily impairs the carrier seeking access if the cost of obtaining the element from the lowest cost competitor is ten percent or more higher than obtaining it from the incumbent LEC where the

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[3/] Given CO Space's view that dark fiber is not proprietary, it will not address in these initial comments the proper interpretation of "necessary" in section 251(d)(2)(A). CO Space, of course, reserves the right in its reply comments to comment on that issue or any other issues in this proceeding, regardless of whether CO Space addresses the issues in these initial comments.